

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

APPLICATION TO CHANGE)	PRELIMINARY DETERMINATION TO
WATER RIGHT NO. 40A 30149296 BY)	GRANT CHANGE
SWIMMING WOMAN RANCH)	

On July 9, 2020 Swimming Woman Ranch (Applicant) submitted Application to Change Water Right No. 40A 30149296 to change Statement of Claim No. 40A 184510 to the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department requested additional information from the Applicant on September 30, 2020. The Applicant responded by submitting information the Department received on November 10, 2020. The Application was determined to be correct and complete as of February 4, 2021. An Environmental Assessment for this Application was completed on March 15, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed

- Application to Change Water Right, Form 606 Stock Tank
- Attachment with narrative addressing the application details and statutory criteria.
- Maps showing collection box, pipeline and stock tank
- Easement Agreement between Applicant and Raymond Jeffers (owner of property where point of diversion is located)
- General Abstract of the water right to be changed

Information Received after Application Filed or Generated by the Department during the Application Process

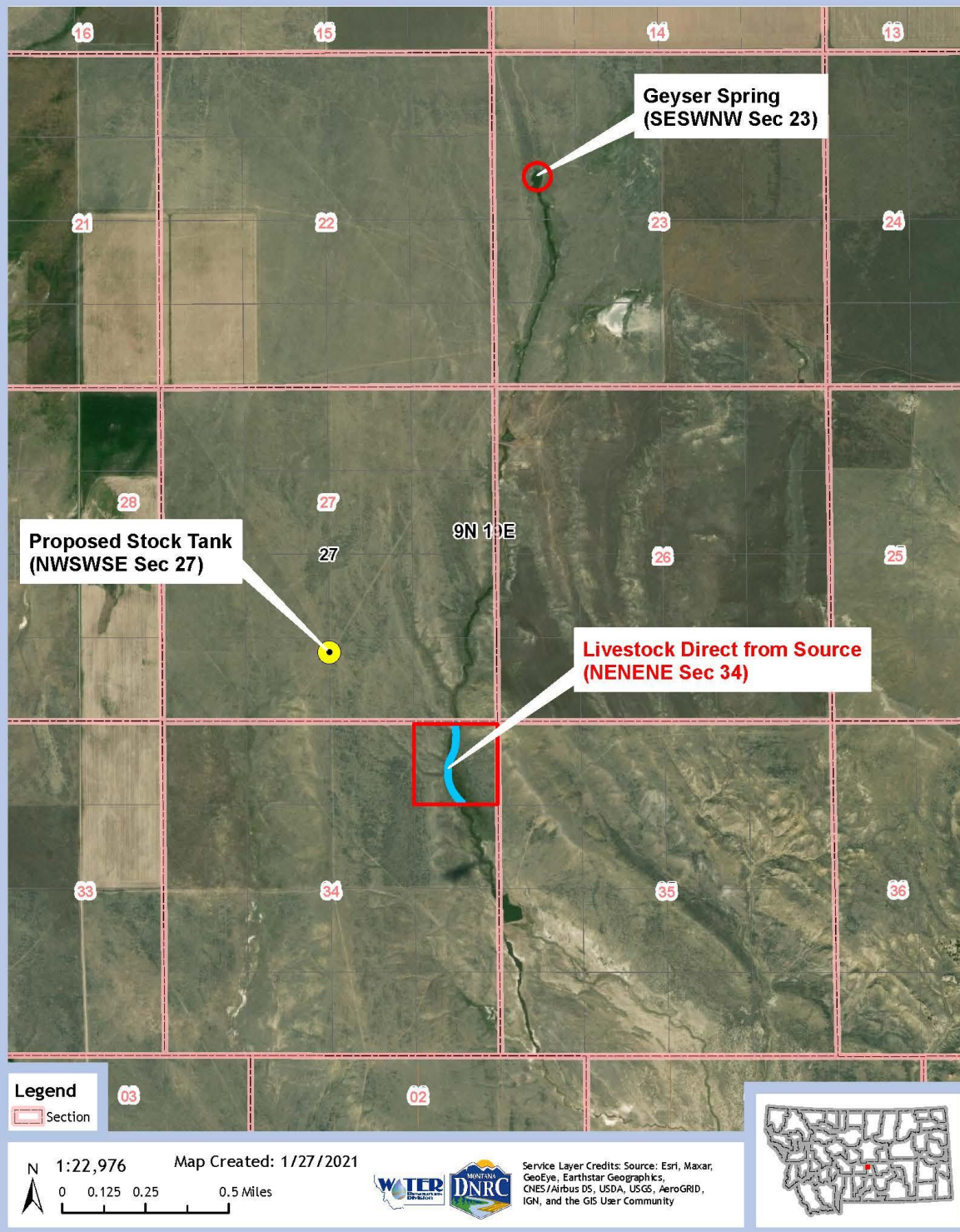
- Applicant's deficiency letter dated November 9, 2020
- Applicant's clarification email regarding questions to deficiency letter response dated January 26, 2021
- Applicant's clarification email regarding stock watering system information and flow rate into the stock tank dated February 4, 2021

Information within the Department's Possession/Knowledge

- File for Statement of Claim No. 40A 184510

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

Stock Tank Change Application No. 40A 30149296 - Proposed Change Map



WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change Statement of Claim No. 40A 184510, with a volume of 30 gallons per day per animal unit. The source is decreed in the Basin 40A Preliminary Decree as groundwater, and more specifically as Spring, Unnamed Tributary of Alkali Creek. The Statement of Claim form submitted for adjudication purposes identified the source as "Geyser Spring," a naturally flowing spring that upwells in the SWNW Section 23, T9N, R19E, Golden Valley County. However, the means of diversion is stock drinking directly from the unnamed tributary of Alkali Creek about two miles downgradient of Geyser Spring, therefore the operational source is surface water that originates from Geyser Spring. The point of diversion (POD) and place of use (POU) are in the NENENE Section 34, Township 9N, Range 19E, Golden Valley County. The priority date is June 20, 1900. The period of diversion and period of use are January 1 through December 31.

CHANGE PROPOSAL

FINDINGS OF FACT

2. The Applicant seeks authorization to add a point of diversion and place of use to the water right. The proposed additional point of diversion is in the SESWNW Section 23 and the additional place of use (one stock tank) is in the NWSWSE Section 27, all in T9N, R19E.¹ The proposed additional means of diversion is a collection box, or infiltration gallery, that taps Geyser Spring in Section 23 (Geyser Spring is the locally-known name of the origination point of the source). A pipeline will convey water from the collection box to the stock tank in Section 27.² The flow rate into the tank is 10

¹ The stock tank is placed on the half section line between the NWSWSE and the NESESW of Sec 27.

² The proposed means of diversion, a developed spring that diverts water from Geyser Spring, is subject to an existing easement agreement between Raymond Jeffers, David Paugh (Swimming Woman Ranch), and Jess Garfield. The development involves a gravity-fed stock watering system from Geyser Spring. At the time the agreement was executed, Raymond Jeffers owned the property where the spring is located; Hooker Cattle Co now owns the property. The development consists of multiple stock tanks and buried pipelines. The stock tank in this proceeding involves approximately one mile of the three-mile pipeline. The other stock tanks in this development are owned by Hooker Ranch and Jess Garfield and are not involved in this proceeding. Their use involves other water rights.

gallons per minute (GPM). The flow rate is based on the capacity of the system to supply water under gravity-flow conditions.

CHANGE CRITERIA

3. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-

2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

4. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

5. The water right proposed for change is Statement of Claim No. 40A 184510. The historic purpose of use is stock and the means of diversion is direct from source. The place of use is where Alkali Creek flows across Applicant's property in the NENENE Section 34, T9N, R19E. The origination point of the source is a naturally flowing spring referred to as Geyser Spring, arising in the SWNW Section 23, T9N, R19E, upgradient from the place of use. Water that naturally upwells and discharges from Geyser Spring into Alkali Creek flows down to the Applicant's property and place of use in Section 34 (the historic place of use is approximately 1.75 miles south of the spring discharge point).³

6. The amount of water historically used is decreed in the Basin 40A Preliminary Decree as 30 gallons per day (GPD) per animal unit (AU). The standard volume unit used in Montana's general stream adjudication is 30 GPD/AU. The claimed number of animal units is 400, therefore, the Department calculates the annual volume to be 13.5 acre-feet (30 GPD/AU X 400 AUs X 366 days/325,851 gallons per acre-feet = 13.5 AF).⁴

³ The Statement of Claim form was completed to reflect a natural spring source named "Geyser Spring," which appears to reflect the origination point of the source of water. The Water Court has decreed the source name as Spring, Unnamed Tributary of Alkali Creek. In this proceeding, the Applicant is requesting to add a spring development that draws groundwater adjacent to Geyser Spring and conveys it to a stock tank. Appropriator is retaining the ability for livestock to continue to drink surface water flowing through Swimming Woman Ranch property from Geyser Spring.

⁴ The volume is considered to be 100% consumptive.

No flow rate is decreed for adjudication purposes to stock drinking directly from the stream.

7. Statement of Claim No. 40A 184510 is a filed type of water right, based on a Notice of Appropriation recorded on August 19, 1901. The Notice indicates that water was first appropriated on June 20, 1900, from Geyser Spring Creek, which is now referred to as Alkali Creek. The Notice supports the claimed place of use in the NE¼ Section 34.

8. The Department finds the following historic use:

WR #	Priority Date	Diverted/ Consumed Volume	Point of Diversion & Place of Use	Period of Use
40A 184510	June 20, 1900	13.5 AF	NENENE Sec 34, T9N, R19E	Jan 1 through Dec 31

FINDINGS OF FACT – *Adverse Effect*

9. The historical volume used under Statement of Claim No. 40A 184510 is 13.5 AF, for stock watering of 400 AUs from January 1 to December 31. No additional animal units will be grazed within the Applicant's pastures under the proposed change, and therefore there will be no increase in volume used.

10. The flow rate to be diverted from the proposed collection box or infiltration gallery into the proposed stock tank is 10 GPM, based on system capacity. Per ARM 36.12.1901(13)(d), for changes from instream stock use to a stock tank(s), the maximum flow rate authorized for the new use will be 35 GPM. In this instance, the proposed flow rate is compliant with the administrative rule.

11. The diversion structure taps into a natural spring that arises to the surface and flows into Alkali Creek. Water diverted from the collection point is the same source that flows from the spring. Water will flow under natural pressure from the developed spring to the stock tank via a pipeline. The valve will control water flow to the tank so that no

water is wasted and to supply the appropriate amount for stock needs. If call is made, the Applicant has the ability to stop diverting.

12. The Department finds there will be no adverse effects from the proposed change.

BENEFICIAL USE

FINDINGS OF FACT

13. The existing water right is for stock use which is a recognized beneficial use under statute. §85-2-102(4), MCA.

14. After authorization of the proposed change, stock may drink water from either the stock tank in Section 27 or direct from Alkali Creek in the NENENE Sec 34. By adding a stock tank, the Applicant will be able to manage its grazing practices more efficiently.

15. No additional animal units will be grazed within the Applicant's pastures under the proposed change, and therefore there will be no increase in volume used. The volume of 13.5 AF conforms to the adjudication standard of 30 GPD/AU, for 400 AUs, and is based on a period of use of January 1 through December 31. The flow rate to convey water into the tank is 10 GPM which is based on the capacity of the system to convey water under natural pressure.

16. The Department finds that a flow rate of 10 GPM and volume of 13.5 AF is a beneficial use.

ADEQUATE DIVERSION

FINDINGS OF FACT

17. The stock water system has been in place and operating since 1984, a period of over 36 years. It was designed by the U.S. Department of Agriculture, Soil Conservation Service and serves three parties (the Applicant and two other private parties). Each party owns its own stock tank(s) and holds separate water rights to the development.

18. The diversion works consists of a collection box, or inverted culvert, excavated into the shallow substrate and adjacent to Geyser Spring. The spring is the origination point of water upwelling and discharging into Alkali Creek. A PVC pipeline, buried to a depth of six feet, taps the collection box and supplies water to the stock tank. The pipeline is two inches in diameter at the collection box, and tapers to 1.5 inches nearer the tank. The stock tank is equipped with a valve to control appropriations. The water system was designed for two tanks to appropriate five GPM or one tank at 10 GPM. The Applicant chose to put in one tank at a flow rate of 10 GPM.

19. The Department finds the means of diversion is adequate for diverting the requested amount.

POSSESSORY INTEREST

FINDINGS OF FACT

20. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. David Paugh is the President of Swimming Woman Ranch, a Montana Corporation and he signed the application in his capacity as an officer of the Corporation.

21. The groundwater development works are located in Section 23, T9N, R19N, on an adjacent ownership (current owner is Hooker Cattle Company, Inc). Applicant has an Easement Agreement with the landowner for use of the spring development and pipeline,

and the Agreement specifies that Applicant may file for a water right from the development. A copy of the Agreement is in the file.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

22. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and

imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).⁵

23. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.⁶

24. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse

⁵ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

⁶ See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974) (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972) (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909) (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896) (change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

effect.⁷ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁸

⁷A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

⁸ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change

25. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁹

26. Although the level of analysis may vary, analysis of the extent to which a proposed

a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

⁹ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

27. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use,

return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

28. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

29. Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

30. Based upon the Applicant's evidence, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim No. 40A 184510 for 13.5 AF in diverted/consumed volume. (FOF Nos. 5-8)

31. Based upon the Applicant's comparative analysis of historic water use and water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 9-12)

BENEFICIAL USE

32. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial

use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

33. Applicant proposes to use water for stock use which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence stock use is a beneficial use and that 13.5 AF of diverted volume is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 13-16)

ADEQUATE MEANS OF DIVERSION

34. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

35. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 17-19)

POSSESSORY INTEREST

36. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802.

37. The Applicant has proven by a preponderance of the evidence that it has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 20-21)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 40A 30149296 should be granted subject to the following.

The Applicant may add a point of diversion (collection box) in the SESWNW Section 23 and one additional place of use (one stock tank) in the NWSWSE Section 27, all in T9N, R19E, Golden Valley County. The Applicant is authorized to continue use of its existing point of diversion and place of use (instream stock use) in the NENENE Section 34, T9N, R19E. The period of diversion and use is January 1 through December 31. The flow rate is 10 GPM and the volume is 13.5 AF per annum for stock use.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the

Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 18th day of March 2021.

/original signed by Scott Irvin/
Scott Irvin, Regional Manager
Lewistown Water Resource Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 18th day of March 2021, by first class United States mail.

ABIGAIL R. BROWN, ARB LAW GROUP
7 W SIXTH AVE, STE 512
HELENA, MT 59601

Regional Office, (406) 538-7459